United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-318-1990 AND 02-343-1990
ABDUL HAMID OMAR LP, MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
7 JUNE 1991

Revenue Law — Stamp duty — Interest capitalized under a charge document — Whether liable to stamp duty — Stamp Act 1949, ss 14 & 28

In these cases the appellant banks as chargees had lent sums to the respondents. The loan agreements provided for interest to be capitalized at the end of each calendar month and to be added to the principal sum. The respondents having defaulted in payment of principal and interest, the appellant banks applied for orders that certain lands charged to them be sold by public action. In the course of the hearing the learned trial judge raised the question of stamp duty and ordered that the proceedings be stayed pending the payment of stamp duties on the interest capitalized under the charges. The appellants appealed.

Held, allowing both appeals:
Capitalized interest and compound interest mean the same thing. Although it was provided in the instruments concerned in each of the cases that interest be capitalized, yet as unpaid interest it retains the character of interest and the instruments concerned need not be separately and further stamped under s 14 of the Stamp Act 1949. Section 28(1) of the Act is also applicable to these cases so that stamp duty is only chargeable on the original loan amounts.

[Bahasa Malaysia summary

Di dalam kes-kes ini bank-bank perayu sebagai pemegang gadaian telah meminjam wang kepada responden-responden. Perjanjian-perjanjian hutang itu memperuntukkan bunga dipermodalkan di akhir tiap-tiap bulan dan ditambah kepada jumlah wang pokok. Responden-responden telah mengingkari membayar wang pokok dan bunga dan bank-bank perayu telah memohon perintah supaya tanah-tanah yang digadai dijual melalui lelong awam. Di dalam mendengar prosiding itu hakim yang arif telah menimbulkan soal duti setem dan telah memerintah prosiding itu digantungkan menunggu pembayaran duti setem atas bunga yang dipermodalkan di bawah gadaian itu. Perayu-perayu telah membuat rayuan.

Diputuskan, meluluskan rayuan itu:
Bunga yang dipermodalkan dan bunga berganda sama maknanya. Sungguhpun diperuntukkan di dalam surat-surat-cara tiap-tiap kes ini bahawa bunga hendaklah dipermodalkan akan tetapi sebagai bunga yang terhutang ia kekal sifatnya sebagai bunga dan surat-suratcara itu tidak perlu disetemkan berasingan dan semula di bawah s 14 Akta Setem. Seksyen 28(1) Akta itu juga dikenakan kepada kes-kes ini dan duti setem hanya dikenakan kepada jumlah hutang yang asal.

Cases referred to
1 *Tomkins* v *Ashby* (1827) 108 ER 551 (refd)
2 *The Commissioners of Inland Revenue* v *Angus & Co Ltd* (1889) 23 QBD 579 (refd)
3 *Barisal Rindan Samiti* v *Sital Chandra Mukhopadhya* 129 IC 407; AIR Cal 630 (follD)
4 *In the matter of the Stamp Ordinances 1881 and 1885, re SRM Supramanian Chitty's Mortgage* (1902) 7 SSLR 92 (follD)
5 *Re Waterhouse's Policy* [1937] Ch 415; [1937] 2 All ER 91 (distd)
6 *Pruessing* v *Ing* 106 ER 912 (follD)
7 *Re Morris, Mayhew* v *Halton* [1922] 1 Ch 126 (follD)
8 *Paton* v *Inland Revenue Commissioners* [1938] AC 341 (follD)
9 *Re Jauncey, Bird* v *Arnold* [1926] 1 Ch 471 (follD)
10 *Inland Revenue Commissioners* v *Oswald* [1945] AC 360 (follD)
11 *Bank of New South Wales* v *Brown* (1982-1983) 151 CLR 514 (refd)
12 *Commercial Banking Co of Sydney Ltd* v *Love & Anor* (1975) 7 ALR 535 (distd)
13 *Westpac Banking Corporation* v *Mousellis* (1985) 37 NTR 1 (distd)

Legislation referred to
Stamp Act 1949 (Rev 1989) ss 14, 28(1)
Stamp Act 1899 [Ind] s 23
Stamp Ordinance 1881 [SS] s 22
Stamp Act 1891 [UK] s 88

Wong Chong Wah (*Shamsul Bahrain bin Ibrahim* with him) for the appellant in CA No 02-381-90.
Chew Kim Poh for the respondent in CA No 02-381-90.
Porres Royan (*Mary Nitchingham* with him) for the appellant in CA No 02-343-90.
MA Vadiveloo for the respondent in CA No 02-343-90.
MS Murthi(*amicus curiae*).

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): The issues raised in these two appeals, which were heard together, involve the court's interpretation of ss 14 and 28 of the Stamp Act 1949 (Rev 1989) (Hereinafter referred to as 'the Act'). The principal issue in these cases was concerned with the construction of s 28 of the Act, that is, whether interest which is capitalized under a charge document still retains the character of interest so that stamp duty is chargeable on the original loan amount only under s 28(1) of the Act. The other issue is connected with the principal issue and raises the question whether such capitalized interest is interest for the purpose of s 14 of the Act so that no stamp duty is chargeable on it.

The background facts of these cases are simple. Two banks, namely, the United Malayan Banking Corp Bhd (hereinafter referred to as 'UMBC') and the Oversea-Chinese Banking Corp Ltd (hereinafter referred to as 'OCBC') as chargees had lent $8m and $150,000 respectively to the two respondents, both of whom had defaulted in repayment of principal and interest after service of notices in Form 16E under s 255 of the National Land Code 1965. In the UMBC case, the loan agreement contained the following clause relating to interest:

> 8.4 Subject to the provisions of cl 8.5 hereof the interest on any principal money for the time being owing including capitalized interest shall at the end of each calendar month be capitalized and be added for all purposes to the princi-

pal sum then owing and shall thenceforth bear interest at the prescribed rate and be secured and payable accordingly and all the covenants and conditions contained or implied by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalized arrears of interest and to interest on such arrears.

And in the OCBC case, the annexure to the charge contained the following clause:

17 The interest on any principal moneys for the time being hereby secured including capitalized interest shall at the end of each calendar month be capitalized and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the rate aforesaid and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalized arrears of interest and to interest on such arrears.

Both banks subsequently applied by originating summons to the High Court at Kuala Lumpur under s 256 of the National Land Code 1965, for orders that certain pieces of land charged to them in Kuala Lumpur be sold by public auction. In the course of hearing those applications, NH Chan J stated that there was a stamp duty question and after hearing submissions of counsel for the parties concerned as well as Mr MS Murthi, who was invited by the learned judge to be *amicus curiae*, made an order in each case that proceedings be stayed pending the payment of stamp duties on the 'interest capitalized' under the charges concerned.

UMBC and OCBC each filed a notice of appeal to this court against the learned judge's refusal to make an order for sale by way of public auction in respect of the lands in question. The memoranda of appeal of both the appellants raised several grounds of appeal which in effect amounted to a contention that the learned judge had erred in his construction of the Act, particularly of s 28 thereof, as requiring the charges concerned to be upstamped with ad valorem duty for 'interest capitalized'.

The Stamp Act 1949, is an Act relating to stamp duties and, as Lord Tenterden had stated in *Tomkins* v *Ashby*,[1] 'Statutes imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the legislature.' The rules of construction of documents for stamp duty purposes and of stamp duty legislation are well summarized in the following passages from Sergeant and Sims *Stamp Duties* (9th Ed) p 18:

(a) General rule of construction of charge

It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language: *Denn & Manifold* v *Diamond* (1825) 4 B&C 243, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous: *Daines* v *Heath* (1847) 3 CB 938. The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it, and no intendment can be made in favour of the liability: *Phillips* v *Morrison* (1844) 13 LJ Ex 212 and *R* v *Winstanley* (1831) 1 Cr & J 434.

(b) Ambiguity

If the statute is so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, one more favourable to the Crown and the other to the subject, then the latter construction should be adopted: *Clifford* v *IRC* [1896] 2 QB 187, approved and followed in *Hennell* v *IRC* [1933] 1 KB 415, CA. In other words, the subject, and not the Crown, is entitled to the benefit of the doubt: *R* v *Winstanley* (1831) 1 Cr & J 434.

We ought to bear in mind the above-quoted rules and that the object of the Act relating to stamp duties is to raise revenue by requiring documents of certain kinds to be stamped. In other words, the Stamp Act tax documents and not transactions [*The Commissioners of Inland Revenue* v *Angus & Co Ltd*[2]]. Before we proceed to construe ss 14 and 28 of the Act, we should also note the following relevant definitions in s 2 of the Act:

'charge' means any instrument whereby, for the purpose of securing the payment of any definite and certain sum of money advanced or lent at the time or previously due or foreborne to be paid or for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon any account current, together with any sum already advanced or due, or without, as the case may be, or for the performance of any contract or engagement, one person creates a right over or charge upon any specified property; and includes any instrument which purports to create or in which any person agrees to create any such right or charge;

'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due or foreborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be;

It is to be observed that the definition of a 'charge' for the purposes of stamp duties under the Act is specific and means any instrument for securing the payment of a definite and certain sum of money advanced or lent at the time or previously due or foreborne to be paid. The expression 'mortgage' for the purposes of the Act also means a security for a definite and certain sum of money advanced or meant to be paid. Both are chargeable with stamp duty under s 4 of the Act, being instruments specified as item 27 in the first schedule of the Act, and it is a general rule of stamp duty that the liability of an instrument to duty depends on the facts and circumstances existing at the date of its execution as provided for in s 5 of the Act.

The section governing the stamping of instruments reserving interest is s 14 of the Act which is as follows:

When interest is expressly made payable by the terms of an instrument; such instrument shall not be chargeable with

duty higher than that with which it would have been chargeable if no mention of interest had been made thereon.

We have not been referred to nor are we aware of any such provision in the corresponding legislation of other jurisdictions except s 23 of the Indian Stamp Act 1899, which is as follows and is in pari materia with s 14 of our Act:

> Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein.

According to *S Row's Indian Stamp Act* (3rd Ed) at p 162, the rule is that express mention of interest in an instrument does not affect the duty with which it is chargeable and that the said section conforms to English law. It was decided by a Full Bench in Calcutta consisting of Rankin CJ and CC Ghose and Patterson JJ in *Barisal Rindan Samiti* v *Sital Chandra Mukhopadhya*[3] through a judgment delivered by Rankin CJ that interest is interest, howsoever the amount is computed or calculated. Compound interest is just as much interest as simple interest and is just as much entitled to any benefit that s 23 gives to the subject. Therefore a stipulation in an instrument to pay compound interest need not be separately stamped as a separate agreement. We are of the view that the same reasoning should apply to the construction of our s 14 of the Act which, as pointed out above, is similar to s 23 of the Indian Stamp Act 1899.

Our attention was also drawn to *In the matter of the Stamp Ordinances 1881 and 1885, re SRM Supramanian Chitty's Mortgage*,[4] which involved a mortgage deed expressed to be made for securing payment of 'the principal sum of $12,000 (whereby $7,500 is the amount advanced and $4,500 is for interest thereon calculated for a period of 60 calendar months from the date hereof)'. Cox CJ of the former Supreme Court of the Straits Settlements held in 1902 that the mortgage deed was liable to ad valorem stamp duty upon $7,500 only. We have read the Straits Settlements Stamp Ordinance 1881, and found the following section therein relating to instruments reserving interest:

> 22 Where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein.

It will be observed that s 14 of the Act is similar to the above-quoted section. The decision of the Straits Settlements Supreme Court in the *Supramanian Chitty's Mortgage* case[4] is supported by the Calcutta Full Bench's interpretation of s 23 of the Indian Stamp Act 1899, in the year 1930. We would therefore similarly conclude in these cases that capitalized interest is interest for the purpose of s 14 of the Act so that no further stamp duty is chargeable thereunder.

We now come to s 28 of the Act, which is as follows:

> 28(1) A security for the payment or repayment of money to be lent, advanced or paid, or which may become due upon an account current, either with or without money previously due, shall be charged, where the total amount secured or to be ultimately recovered is in any way limited, with the same duty as a security for the amount so limited.
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> (2) Where such total amount is unlimited, the security is to be available for such an amount only as the ad valorem duty stamped thereon extends to cover; but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument bearing date on the day on which the advance or loan is made.

Section 28 of the Act is in pari materia with s 88 of the UK Stamp Act 1891, which we would not reproduce here as it was referred to in the judgment of Farwell J to which we would refer later on in this judgment.

Although s 88 of the UK Stamp Act 1891, was in force until 1971 when it was repealed by the Finance Act 1971, which abolished stamp duty on bonds, mortgages, etc in the United Kingdom, neither we nor counsel have found a relevant decision of the English courts under that section except *Re Waterhouse's Policy*[5] in which Farwell J of the Chancery Division held that where a charge to secure a current account without a limit is stamped with a stamp sufficient to cover advances up to a certain sum and the current account subsequently exceeds that sum, the charge is valid security properly stamped for that sum, but is unenforceable as to the remainder of the loan until properly stamped. As this is a relevant English decision under the repealed s 88 of the UK Stamp Act 1891, it would be useful to refer to the following passages in the judgment of Farwell J in that case at pp 418-420:

> The whole controversy in this matter depends upon two sections of the Stamp Act 1891. Section 88, sub-s 1 provides: 'A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.' So far there would not appear to be any difficulty. Where the loan is for a definite fixed sum and security is given for that sum, a stamp duty is to be paid sufficient to cover the total amount which the lender is entitled to recover. It is quite plain that in order to make the security a security for the full amount agreed to be lent, the security must be stamped on the total of that sum.
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> Then sub-s 2 provides: 'Where such total amount is unlimited, the security is to be available for such an amount only as the ad valorem duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made.'
>
> ...

> In my judgment, that is not the true effect of sub-s 2 of s 88. The effect of that sub-section is this. Where the total amount is unlimited, as for instance in this case where the bank permits one of its clients to overdraw his account and there is no fixed limit placed upon the amount allowed in overdraft, or where there is a security for a limited sum, and an overdraft is allowed beyond that limited sum, there is no necessity to stamp the security for any amount greater than the amount for which the bank rely upon it as a security for the loan. By that I mean that if a bank chooses to take security for an overdraft and stamps that security with a stamp which is only sufficient to cover a limited sum, then, as the result of sub-s 2, the bank is precluded from claiming either in a court of law or elsewhere that the security which it has is a security for any greater sum than that which the stamp on it covers.

It should, however, be pointed out that although *Re Waterhouse's Policy*[5] was a decision under s 88 of the UK Stamp Act 1891, it was a case involving an insurance policy assigned to a bank by way of mortgage to secure a current account without limit and the assured's loan from the bank was in excess of the amount for which the assignment was stamped.

We were, however, also referred to *Pruessing* v *Ing*[6] in which case Abbott CJ held in 1821 that a promissory note for the payment of £30 at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding £30. His Lordship, after referring to the Stamp Act of that period, said as follows:

> The object of the legislature was to impose a prorata stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. The question, therefore, in this case is, what was the sum due at the time when the note was taken? For that is the sum secured. I am quite satisfied that the words 'sum of money' in the Act, mean the principal sum mentioned in the note, and not a sum compounded of principal and interest. A contrary decision would be most mischievous, and have the effect of avoiding many securities; for it has been the constant practice, under similar provisions applicable to bonds in this and former Stamp Acts, to measure the stamp duty by the principal sum secured, although interest is always made payable from the date of the bond.

The above is therefore another case which confirms that stamp duty is only payable on the principal sum secured at the time of taking the security.

Reference was also made to 14 *Form and Precedents* (4th Ed) in which the learned authors, in a footnote at p 84 has stated that 'amount secured' means principal money secured and does not include interest (even when in arrears) costs and commission. A provision in a mortgage for unpaid interest to be added to the principal sum secured does not render the mortgage liable to further stamp duty when the capitalization takes place.

We now turn to a few revenue cases in which it was decided in relation to income tax legislations that capitalized interest and compound interest mean the same thing. It was also decided that the word 'paid' means actual payment and not notional payment. The first case is *Re Morris, Mayhew* v *Halton*[7] in which Lord Sterndale MR, in relation to compound interest with annual rests, said as follows at p 132:

> The process would be more complicated but would, as it seems to me, effect the same result, if the interest were not added to the capital, but two accounts were kept, one charging interest upon capital year by year, and the other charging interest upon the sums of overdue interest which are not paid from year to year. That however is not the way in which it is done in practice. It would be a cumbrous and unbusinesslike way of doing it. The way in which it is done as a matter of business is by adding the interest year by year — namely, the interest for the first year to the capital sum, the interest for the second year to the capital sum, plus the first year's interest. This is commonly and conveniently spoken of as capitalizing the interest. It is capitalizing the interest in a sense, and in the sense in which Mr Beaumont put the matter to us. He said that the interest should be treated as capital for the purpose of bearing interest; and in the sense that it becomes a thing which bears interest itself, which interest, as a rule, does not, it may be said to be capitalized — that is to say, it may be said to be put in the same position as capital in the sense that it is regarded as a thing which bears interest. But it seems to me that it is going a very long way beyond that to say that it is made capital for all purposes, and that when it is paid, at the expiration of three, four, five or ten years, it is all paid, with the exception of the last year, as capital. I do not think that the words 'compound interest with yearly rests' at all necessarily show, or indeed do show, that the mortgagors intended that any unpaid interest should become capital for all purposes, the result no doubt, if it were so, being that they would pay more than they would if it were to be considered as interest, because if they had paid their interest at the end of the first year they would have paid less tax.

In that case, it was decided that compound interest had not been capitalized and was still 'interest of money' within the meaning of the UK Income Tax Act 1918.

The next case is *Paton* v *Inland Revenue Commissioners*[8] in which the House of Lords held that the action of a bank in debiting the account of a customer with interest did not constitute as between it and the customer a payment of interest by the customer within the meaning of the Income Tax Act 1918. Lord Atkin, in relation to a provision in the deed concerned which enables interest to be capitalized said at p 351, quoting Lord Russell in *Re Jauncey, Bird* v *Arnold*,[9] 'The interest is not capitalized because it is in fact paid, but because it has in fact not been paid.'

Lord Macmillan in *Paton*'s case[8] also said as follows at p 356:

> My Lords, it is a condition of a claim for repayment of tax on bank interest under s 36, sub-s1, that the taxpayer shall have 'paid' to his bank the interest in respect of which he claims repayment of tax. In my opinion this means that the taxpayer must really, and not merely notionally, have paid the interest; there must be payment such as to discharge the debt; the payment must be a fact not a fiction.

Then in *Inland Revenue Commissioners* v *Oswald*[10] at p 373, Lord Macmillan again expressed the view that unpaid interest never ceases to retain its character as

interest, although it has from time to time been added to the capital indebtedness and has carried interest in turn. In that case, Lord Porter also said as follows at p 379:

> In each case there is a debt and in each case there is a contract under which, in default of payment, a so-called capitalization of interest takes place. It is true that in the one case the contract is constituted by the custom of bankers and in the other by a deed of mortgage, but the substance, though not the machinery, is the same. Capitalization means no more than that interest, which continues to be interest, shall be treated together with the capital sum due as itself interest-bearing but does not alter its quality as interest.

All these decisions show that capitalized interest is in fact compound interest which had not been capitalized and still retains its character as interest.

We now refer to the views expressed by two judges of the High Court of Australia on the capitalization of accrued interest in *Bank of New South Wales* v *Brown*,[11] which is a case concerning s 112 of the Australian Bankruptcy Act 1966. Gibbs CJ said at p 523 as follows:

> When, in accordance with normal banking practice, accrued interest is debited to a customer's current account, and itself bears interest, it may be convenient to say that, as between the banker and the customer, and those who stand in their shoes, the interest is treated as capital. In truth, however, the interest is not converted into capital, and the rights of third parties must be determined on the footing that the interest retains its character as such.

Brennan J, after discussing three categories of 'capitalization', said as follows at p 545:

> It follows that the character of a debt for interest is not altered when it is capitalized in accordance with what Lord Eldon LC in *Ex parte Bevan* called a 'previous agreement'. It is immaterial whether the previous agreement is to be found in the acceptance of the custom of bankers (whether an express or implied acceptance), in a bill of mortgage or in some other instrument securing a debt owed to a bank. An agreement which merely authorizes a bank to add accrued interest to the principal in order that the total sum should be secured or should bear interest does not alter the character of the debt for interest. The total sum may appropriately be described as 'principal', but capitalization in this sense is no legal alchemy for changing the character of a debt for interest.

Mr MS Murthi, as *amicus curiae*, stated that s 28 of the Act was not concerned with the amounts advanced to the respondents as shown in the appellant banks' documentation of the loans. He referred to an affidavit affirmed by the assistant general manager of UMBC (pp 76-85 of the UMBC appeal records) and pointed out that UMBC was now claiming over $15m from its client respondent. Counsel referred us to *Commercial Banking Co of Sydney Ltd* v *Love & Anor*[12] in which the High Court of Australia decided that s 83(2) of the Stamp Act 1921-1967 (Western Australia) provided for the payment of duty by limiting the recovery by the mortgagee to the amount of duty ultimately paid. The section does not limit the mortgagee's security to the amount of duty first paid. He then referred us to *Westpac Banking Corporation* v *Mousellis*[13] in which case the Supreme Court of the Northern Territory of Australia found that at the date of entry of judgment, none of the mortgages concerned has been duly stamped in accordance with s 4(3) of the Taxation (Administration) Act 1978 (NT). The Court also held that it was a necessary inference from s 69(B)(3) of the Act that, although not duly stamped, a security could be pleaded and used in evidence, despites 121, provided the action on it was limited to enforcing it to the extent of the amount covered by the duty paid. Counsel then urged us to follow the Australian authorities cited by him and to allow the appellants to recover only the amounts lent for which the instruments in question were covered by stamp duties paid by the chargors. Finally, Mr Murthi also pointed out that if the documents in these cases are not further stamped with duties covering the capitalized interest, then the government would, according to him, be losing 'millions of dollars'.

With respect, we do not propose to examine the provisions of the Australian Stamp Acts referred to in the cases cited by Mr Murthi as they are not in pari materia with the provision of our Act. The short answer to the anxiety expressed by counsel is that if it should be intended that stamp duties should be chargeable on instruments reserving interest, then there ought to be an amendment of the Act to make the intention of the legislature manifestly clear and unambiguous. It should however be noted that these proceedings were not the result of an appeal to the High Court under s 39 of the Act nor has the Collector of Stamp Duties or any counsel from Revenue applied to intervene in these proceedings.

Be that as it may, having considered the submissions of counsel and what we have stated above, we are therefore of the view that capitalized interest and compound interest mean the same thing. Although it has been provided in the instruments concerned in each of these cases that interest be capitalized, yet as unpaid interest it retains the character of interest and the instruments concerned need not be separately and further stamped under s 14 of the Act. In these cases, the principal sums of money lent or the amounts secured were limited to $8m and $150,000 respectively, and are distinguishable from the case of *Re Waterhouse's Policy*[5] where the current account was without a limit. It is therefore our judgment that s 28(1) of the Act is also applicable to these cases so that stamp duty is only chargeable on the original loan amounts.

Both appeals are therefore allowed but as counsel for the respondents had indicated to us before we proceeded to hear the appeals that they were not opposing them, we would not make any order on costs in so far as

these appeals are concerned. We hereby remit these cases back to the High Court for it to continue hearing the originating summons concerned. We would also like to repeat our expression of gratitude to all counsel for the assistance they have rendered to this court.

Appeals allowed.

Solicitors: *Skrine & Co; Yusof Abdullah & Partners; Shook Lin & Bok; Veloo & Co; MS Murthi & Partners.*

Reported by *Prof Ahmad Ibrahim*

Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22-435 OF 1990
MOHAMED DZAIDDIN J
11 DECEMBER 1990

Civil Procedure — Injunction, ex parte — Setting aside — Whether can be set aside on ex parte application

The defendants applied ex parte to set aside the ex parte injunction which was granted to the plaintiff. The issue before the court was whether in the exercise of its discretion, it should entertain the ex parte summons-in-chambers.

Held, dismissing the defendants' application:

(1) The court can dissolve an ex parte injunction made on an ex parte application provided a case of sufficient cogency can be made out and the plaintiffs are informed of the application.

(2) From the facts, the plaintiff was not informed of the application, and this is fatal to the defendants' application. However compelling the reason was for the ex parte order to be dissolved immediately, the fact that the plaintiff or his solicitors were not informed of the application has persuaded the court not to grant the order.

[Bahasa Malaysia summary

Defendan-defendan memohon ex parte untuk mengenepikan injunksi ex parte yang diberi kepada plaintif. Isu di hadapan mahkamah ialah sama ada dalam penggunaan budibicaranya, ia patut mendengar saman dalam kamar ex parte itu.

Diputuskan, menolak permohonan defendan:

(1) Mahkamah boleh membubarkan injunksi ex parte yang dibuat atas permohonan ex parte dengan syarat bahawa satu kes yang cukup kuat boleh dikemukakan dan plaintif-plaintif diberitahu tentang permohonan tersebut.

(2) Daripada fakta-fakta, plaintif tidak diberitahu akan permohonan ini dan ini amat memudaratkan permohonan defendan-defendan. Betapa memaksa pun alasannya bagi perintah ex parte dibubarkan dengan serta-merta, fakta bahawa plaintif atau peguamcaranya tidak diberitahu tentang permohonan ini telah mempengaruhi mahkamah supaya tidak memberi perintah itu.]

Cases referred to

1 *Subramaniam Lakshamanasamy* v *Datuk S Samy Vellu & Ors* [1988] 1 MLJ 42 (distd)

2 *Castle Fitness Consultancy Pte Ltd* v *Manz* [1990] 1 MLJ 141 (distd)

3 *London City Agency (JCD) Ltd & Anor* v *Lee & Ors* [1970] Ch 597 (refd)

RJ Manecksha for the first defendant.

K Balasundaram (Edmund Gnanamuthu with him) for the second, third, sixth and seventh defendants.

Cur Adv Vult

Mohamed Dzaiddin J: This is the defendants' application, made ex parte, to set aside the ex parte injunction which I granted to the plaintiff on 3 December 1990.

The preliminary issue to be decided today is whether, in the exercise of my discretion, I should entertain this ex parte summons-in-chambers. Yesterday, I heard full submissions of counsel with respect to this ex parte application. Encik Balasundaram, for the defendants, submitted that due to the urgency of the matter, as explained by the third defendant in his supporting affidavit (lampiran 9), this court can hear the defendants' application ex parte. Counsel relied on my decision in *Subramaniam Lakshamanasamy* v *Datuk S Samy Vellu & Ors*[1] and the Singapore High Court decision in *Castle Fitness Consultancy Pte Ltd* v *Manz*[2] for the proposition that an interim injunction can be dissolved ex parte. Be it noted that in both cases we followed the decision of Megarry J in *London City Agency (JCD) Ltd & Anor* v *Lee & Ors*.[3]

The facts of the present application are these. On the morning of 6 December 1990, the defendants' solicitors, Messrs Balasundaram & Co, filed in the registry an ex parte summons-in-chambers together with an affidavit, memorandum of appearance and 'perakuan segera'.

The entire file was then passed to me by my registrar for further direction. I was informed by my interpreter that counsel was outside my chambers in case I wanted to hear the application on the same day. However, after perusing the relevant documents I minuted on the file that it be heard on 10 December 1990 at 2.30pm. I had then in mind for the matter to be heard inter partes and it would be suitable for the plaintiff's counsel to travel to Penang on the morning of 10 December 1990. However, at the outset of the hearing yesterday, I was told by my interpreter that the matter would be heard ex parte. Throughout his submission, Encik Balasundaram did not indicate to me if he or his firm had informed the plaintiff's solicitors about the ex parte hearing. Thus, in the absence of any explanation by counsel, I formed the impression that the plaintiff's solicitors were unaware of the present application.

Now, on the law, the court can dissolve an ex parte injunction made on an ex parte application provided: